NOT TO BE PUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JAY TODD HESSMAN, Defendant.	No. CR02-3038-MWB **REPORT AND RECOMMENDATION ON DEFENDANT'S MOTIONS TO SUPPRESS**

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I. INTRODUCTION

This matter is before the court on motion to suppress evidence (Doc. No. 22) and supporting brief (Doc. No. 23) filed February 28, 2003, by the defendant Jay Todd Hessman ("Hessman)." On March 14, 2003, the plaintiff (the "Government") filed a resistance to the motion, with a supporting brief. (Doc. Nos. 26 & 27) Pursuant to the trial scheduling

order entered November 15, 2002 (Doc. No. 10), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge for the filing of a report and recommended disposition.

The court held hearings on the motion on March 18 and April 11, 2003, at which Assistant United States Attorney Kevin Fletcher appeared for the Government, and Dewey P. Sloan, Jr. appeared for Hessman. Hessman waived personal appearance at the first hearing, and appeared in person at the continued hearing. The Government offered the testimony of Palo Alto County Magistrate Donald Capotosto, and Special Agent Rodney Alan Fox of the Iowa Division of Narcotics Enforcement. The following exhibits were admitted into evidence without objection from Hessman:

Gov't Ex. 1: Three-page transcription of Palo Alto County Sheriff's Department telephone calls on May 13-14, 2000 (labeled "Hessman Tape 634-0003A").

Gov't Ex. 2: One-page facsimile cover sheet from Palo Alto County Sheriff's Office to Magistrate Capotosto dated May 14, 2000. Contains handwritten note by Deputy Suhr to the Magistrate, "Don Here is the paper work. 74-4."

Gov't Ex. 3: Three pages consisting of facsimile cover sheet and attached search warrant, from Magistrate Capotosto to Deputy Suhr, dated May 14, 2000. Contains handwritten note from the Magistrate to Deputy Suhr, "Todd – Here is signed warrant."

Gov't Ex. 4: Seven-page Return of Service dated May 15, 2000, with attached inventory of seized property.

Gov't Ex. 5: Six-page Official Report of Iowa DCI Criminalistics Laboratory, Case No. 00-05353, dated July 6, 2000.

Gov't Ex. 6: Two-page book-in telephone log dated May 14, 2000, signed by J. Hessman and Deb Hessman.

Gov't Ex. 7: Videotape of Jay Hessman's booking in Palo Also County, dated May 14, 2000.

Gov't Ex. 7A: Twelve-page transcript of booking video of Hessman, dated May 14, 2000.

Gov't Ex. 8: Ten-page Application and Affidavit for Search Warrant, and Search Warrant, in *State of Iowa v. Hessman*, Palo Alto County District Court, for search of premises at 1102 Scott Street, Ruthven, Iowa, dated May 14, 2000.

Gov't Ex. 9: Sixty-six-page transcript of hearing on motions to suppress in *State of Iowa v. Hessman*; Nos. FECR003164 and FECR003165, Palo Alto County District Court, dated July 10, 2000.

Gov't Ex. 10: Twenty-page order entitled "Rulings on Motions to Suppress," in *State of Iowa v. Hessman*, Nos. FECR003164 and FECR003165, Palo Alto County District Court, dated July 19, 2000.

Gov't Ex. 11A: Thirty-six page deposition of Deputy Todd Suhr, Vol. I, in *State of Iowa v. Hessman*, Nos. FECR003164 and FECR003165, Palo Alto County District Court, dated June 22, 2000, with exhibits.

Gov't Ex. 11B: Ten-page deposition of Reserve Deputy Kenley Zwiefel in *State of Iowa v. Hessman*, Nos. FECR003164 and FECR003165, Palo Alto County District Court, dated June 22, 2000, with exhibits.

Gov't Ex. 12: Two pages consisting of MCI WorldCom telephone bill for Magistrate Capotosto's cell phone (515-887-4481), from April 17 to May 14, 2000.

Gov't Ex. 13A: Nine pages consisting of GTE phone bill for the Palo Alto County Sheriff's office, dated May 28, 2000.

Gov't Ex. 13B: One-page letter dated March 26, 2003, to the Palo Alto County Attorney from the Palo Alto County Sheriff.

Gov't Ex. 14: One page consisting of the original of the facsimile cover sheet identified above as Gov't Ex. 2.

Gov't Ex. 15: Three pages consisting of the original of the facsimile cover sheet and attached search warrant identified above as Gov't Ex. 3.

Gov't Ex. 16: One page consisting of a facsimile cover sheet dated May 14, 2000 (identical to the first page of Gov't Ex. 15, with the hotel's fax information removed from the top of the document).

Gov't Ex. 17: One-page Supervisory Order from the Iowa Supreme Court entered December 30, 1994, captioned "In the Matter of Facsimile Transmissions."

Gov't Ex. 18: Four-page "Response to Court's Directions for Transcript Review with Sheriff and Deputy," filed February 20, 2001, in *State of Iowa v. Hessman*, Nos. FECR003164 and FECR003165, Palo Alto County District Court.

The court has reviewed the parties' briefs and carefully considered the evidence, and now considers the motions ready for decision.

II. FACTUAL BACKGROUND

On the evening of Saturday, May 13, 2000, Deputy Todd Suhr paged Palo Alto County Magistrate Donald Capotosto to obtain a search warrant to search Hessman's house. Magistrate Capotosto returned the page at 11:44 p.m., and spoke with Deputy Suhr for 1.1 minutes. (*See* Gov't Ex. 12, Magistrate Capotosto's personal telephone bill) Magistrate Capotosto began the phone call by stating, "Somebody paged me?" (*See* Gov't Ex. 1[1]) Deputy Suhr advised Magistrate Capotosto, "I got a search warrant I'm working on to have you take a look at." When Magistrate Capotosto advised Deputy Suhr that he was in a hotel in Des Moines, Iowa, Deputy Suhr asked, "Do you want me to try to find somebody else or. . . ?" Magistrate Capotosto responded, "No," and told Deputy Suhr, "Go ahead and

[1]The calls that evening between Deputy Suhr and Magistrate Capotosto were recorded by the Palo Alto County Sheriff's Department's recording system, with one possible, and notable, exception, discussed by the court later in this opinion. Gov't Ex. 1 is a transcript of those recordings.

I'll have to call down and find out [the hotel's] fax number, so I'll call you back in a couple of minutes." (*Id.*)

Magistrate Capotosto called Deputy Suhr again at 11:46 p.m., and spoke with him for 1.5 minutes. (*See* Gov't Ex. 12) Magistrate Capotosto advised Deputy Suhr that the hotel fax number was 515-278-2846. Deputy Suhr responded, "Okay. I'm just finishing up . . . typing it right now." (Gov't Ex. 1) Deputy Suhr asked for the telephone number of the hotel, and Magistrate Capotosto advised him the number was 515-278-4755. Deputy Suhr told Magistrate Capotosto, "I will probably call you to let you know when I start to fax this so maybe you can be by the machine there." Magistrate Capotosto responded, "That's fine, right, I will do that." Deputy Suhr commented, "Thanks Don. It's going to be a little bit. I'm still . . . doing my . . . cramped finger typing here." (*Id.*)

About half an hour later, at 12:22 a.m. on Sunday, May 14, 2000, Deputy Suhr called Magistrate Capotosto at his hotel room and stated, "I got 'er done." (*See* Gov't Ex. 1; Gov't Ex. 13A, Palo Alto County Sheriff Department's telephone billing records) Deputy Suhr said, "I'll be shooting it to you here in a few minutes." Magistrate Capotosto asked for Deputy Suhr's return fax number, and Deputy Suhr told him the Palo Alto County Sheriff Department's fax number was 712-852-3914. Magistrate Capotosto told Deputy Suhr, "I'll go right down there." (Gov't Ex. 1) The phone records reflect this call lasted 1.4 minutes. (Gov't Ex. 13A) From 12:30 a.m. to 12:33 a.m., Deputy Suhr faxed the search warrant application and the proposed warrant to the hotel. (*Id.*[2]) Deputy Suhr called the hotel at 12:35 a.m., to confirm that Magistrate Capotosto was at the fax machine to receive the fax. (Gov't Exs. 1 & 13A) Magistrate Capotosto signed the search warrant and, according to

[2]This is the time of the fax transmission according to page 12 of the Palo Alto County Sheriff's telephone bill. (Gov't Ex. 13A) The timing is contradicted by Government Exhibit 15, a fax cover sheet indicating the fax was received at Magistrate Capotosto's hotel at 11:43 p.m. on May 13, 2000. In light of the other evidence in the case, the time stamp from the hotel's fax machine makes no sense. The court finds this apparent discrepancy simply reflects an error in the clock setting on the fax machine at the hotel.

the time stamp on the Palo Alto County Sheriff's fax machine, faxed it back to Deputy Suhr at 1:02 a.m. on May 14, 2000. (*See* Gov't Ex. 16, fax cover sheet) No other telephone calls relevant to these facts were recorded that evening by the Palo Alto County Sheriff's recording system, and the telephone bills of Magistrate Capotosto and the Palo Alto County Sheriff's Department reflect that no other relevant calls were made on the night of May 13-14, 2000. (*See* Gov't Exs. 1, 12, and 13A)

The documents that were faxed to Magistrate Capotosto at the hotel consisted of an application for a search warrant to search Hessman's residence in Ruthven, Iowa, and a search warrant. The application consists of eight pages. The first page bears the heading "Application and Affidavit for Search Warrant," and begins with the phrase, "I, Sergeant Todd D. Suhr, being first duly sworn on oath, state[.]" This phrase is followed by three pages on which Deputy Suhr describes the location to be searched, and the property he believes is being used for criminal purposes. At the end of the third page is the legend, "SEE ATTACHED ABSTRACT OF TESTIMONY." The fourth page is headed "Informant's Attachment," and contains check-boxes to indicate the reliability of a confidential informant who provided information leading to the application for a search warrant.

The fifth page of the application is the first page in the application that contains spaces for signatures. A line appears for the applicant's signature, and another for the Magistrate's signature. Deputy Suhr signed as the applicant. Immediately below his signature, Magistrate Capotosto filled in blanks indicating the application was subscribed and sworn to before him by Todd D. Suhr on May 14, 2000, followed by the Magistrate's signature. The sixth page of the application is entitled "Magistrate's Endorsement to Search Warrant Application and Affidavit." The endorsement contains Magistrate Capotosto's signature and the handwritten date of May 14, 2000. The last two pages of the application are entitled "Abstract of Testimony - Affidavit." On the second page of the

Abstract of Testimony appears the signature of Deputy Suhr, and the handwritten date of May 14, 2000. (Gov't Ex. 8)

The court finds that no part of the search warrant application was signed by Deputy Suhr until the next morning, after the search warrant had been executed, the search was concluded, and Hessman had been arrested. (*See* Gov't Ex. 9, Transcript of Hearing on Motions to Suppress in *State of Iowa v. Hessman*, July 10, 2000, pp. 31-34, 54) The parties do not seriously dispute this fact. However, two important factual issues remain to be resolved. First, the court must determine whether Deputy Suhr was placed under oath at any time before the search warrant was executed. Second, the court must determine whether there were any additional telephone conversations, not summarized above, between Deputy Suhr and Magistrate Capotosto before Magistrate Capotosto signed the warrant and faxed it back to the Palo Alto County Sheriff's Department.

At the hearing before this court, Magistrate Capotosto testified he specifically recalled discussing the facts supporting the warrant with Deputy Suhr in detail before he signed the warrant. He also testified that although he had no specific recollection of placing Deputy Suhr under oath before this discussion, his customary practice would have been to do so. At a state court suppression hearing on July 10, 2000, Deputy Suhr testified he did not recall being placed under oath until the next day, well after the execution of the search warrant, when he signed the application in front of Magistrate Capotosto. (*See* Gov't Ex. 9, p. 33) He stated he had not signed the application before that time because the Magistrate "wanted it signed and sworn in his presence." (*Id.*)

In a deposition given in the state court case on June 22, 2000 (*see* Gov't Ex. 11A), which notably was only 39 days after these events occurred, Deputy Suhr testified as follows:

> Q: Okay. Was anything other than your search warrant application presented to the magistrate?

A: Just the application affidavit and then the search warrant itself. All those items were faxed to him.

(Gov't Ex. 11A, p. 21) During Deputy Suhr's testimony at the state court suppression hearing eighteen days later, Deputy Suhr changed his testimony, stating that on the evening of May 13, 2000, he talked with Magistrate Capotosto about the confidential informant whose information he had relied upon in the search warrant application. (*See* Gov't Ex. 9, pp. 21-22) Later in the same hearing, Deputy Suhr changed his testimony again. He testified that after he called the hotel to make sure Magistrate Capotosto was receiving the fax transmission, he "was in the middle of doing a lot of different things," and "then the fax came back with a search warrant signed by the Magistrate." (*Id.*, p. 23.) When asked again, near the end of his testimony in the suppression hearing, Deputy Suhr testified that when he spoke with the Magistrate on the phone, he "gave him the details of the application," although he did not recall if he was under oath at the time. (*Id.*, pp. 34-35)

Any conversation between Deputy Suhr and Magistrate Capotosto that involved the deputy being placed under oath and then providing the magistrate with a factual basis to support the search warrant would have had to occur on May 14, 2000, between 12:35 a.m., when Deputy Suhr confirmed the Magistrate was at the hotel's fax machine receiving the faxed search warrant application, and 1:02 a.m., when the Magistrate faxed the signed search warrant back to Deputy Suhr. There is no recording of any such telephone call on the recording system of the Palo Alto County Sheriff's Department, or on Magistrate Capotosto's personal telephone bills. (*See* Gov't Exs. 12 & 13A)

Sheriff Russell B. Jergens explains the Sheriff's Department has two main lines connected to a system that records all calls to and from the Department, and a third line, for the fax machine, to which calls roll over if the first two lines are busy. According to Sheriff Jergens, "Deputy Suhr is very conscien[tious] about the use of the non-recorded line and would not have used it for the search warrant application." (Gov't Ex. 13B) Sheriff

Jergens speculates, however, that if Magistrate Capotosto had called Deputy Suhr when the two main lines were busy, the call could have rolled over to the non-recorded line.

The difficulty with this hypothesis is the absence of any such phone call on Magistrate Capotosto's phone bill. (*See* Gov't Ex. 12) For there to have been an unrecorded conversation between Deputy Suhr and Magistrate Capotosto during which the deputy was placed under oath and then was asked to provide a sworn factual basis for the search warrant application, the following four things all would have had to occur sometime during the 27 minutes between 12:35 a.m. and 1:02 a.m. on May 14, 2000:

1. Magistrate Capotosto read the search warrant application;
2. He telephoned Deputy Suhr at the Palo Alto County Sheriff's Department;[3]
3. When the call came into the Palo Alto County Sheriff's Department, the two main lines were busy, and the call therefore rolled over to the fax line; and,
4. Magistrate Capotosto's telephone company did not bill him for the phone call. (*See* Gov't Ex. 12)

The court does not believe this is what happened. The court finds Deputy Suhr faxed an unsigned, unsworn search warrant application to Magistrate Capotosto at the Magistrate's hotel in Des Moines. Magistrate Capotosto read the search warrant application, and without placing Deputy Suhr under oath or talking with Deputy Suhr about the facts supporting the application, he signed the warrant and faxed it back to Deputy Suhr. The deputy and other officers executed the warrant, discovered incriminating evidence in Hessman's house, and placed Hessman under arrest. Early that Sunday morning, while Hessman was being booked, he voluntarily made several arguably incriminating statements. These statements were videotaped. (*See* Gov's Ex. 7) Later that Sunday morning, after

[3] According to Sheriff Jergens, this hypothetical conversation could not have been initiated by Deputy Suhr because Deputy Suhr would have made sure he was using one of the two main lines that were linked to the recording system for any call to the Magistrate. In any event, no such call is reflected on the Palo Alto County Sheriff's phone bill. (*See* Gov't Ex. 13A)

the search warrant was executed, Magistrate Capotosto met with Deputy Suhr, placed the deputy under oath, and had Deputy Suhr sign the search warrant application.

Hessman and his wife were prosecuted in state court before these federal charges were brought. After a suppression hearing, the state court judge suppressed the evidence seized during the search of the Hessman's home and the statements the Hessmans made after their arrest.[4] (*See* Gov't Ex. 10) In making these rulings, the judge observed that Suhr's testimony was inconsistent and not credible, suggesting he even may have committed perjury. (*Id.*, pp. 19-20)

III. DISCUSSION

A. Validity of Unsigned, Unsworn Affidavit

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, *supported by Oath or affirmation*, and particularly describing the place to be searched, and the persons and things to be seized. [Emphasis added.]

It is axiomatic that a search warrant not supported by oath or affirmation is an invalid warrant. *Nathanson v. United States*, 290 U.S. 41, 46-47, 47, 54 S. Ct. 11, 13, 78 L. Ed. 159 (1933) (magistrate may find probable cause only from facts or circumstances presented to him under oath or affirmation); *see United States v. Roberts*, 441 F.2d 1224, 1227 (8th Cir. 1971); *Lopez v. United States*, 370 F.2d 8 (5th Cir. 1966); *United States v. Elliott*, 210 F. Supp. 357, 360 (D. Mass. 1962) (warrant invalid when not sworn to before judge or magistrate as required by Fourth Amendment and Fed. R. Crim. P. 41(c)); 8 Fed. Proc.,

[4]The state court judge did not conduct an analysis under *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). *See State v. Cline*, 617 N.W.2d 277, 292-93 (Iowa 2000) (rejecting the "good faith" exception under Iowa state law.)

L. Ed. § 22:129 (2003) ("Both the Fourth Amendment and [Fed. R. Crim. P.] 41(c)(1) require that the information relied upon to establish probable cause be supported by oath or affirmation. The affidavit or affidavits on which a warrant is issued must be sworn to before a federal magistrate or state judge; otherwise it is invalid."); 3 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, Federal Rules of Criminal Procedure § 670 (2d ed., 2003 Suppl.) ("[A] search warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge."). Whether the information given to the magistrate or judge in support of a search warrant was given on oath or affirmation within the meaning of the Fourth Amendment is a question of fact. *Frazier v. Roberts*, 441 F.2d 1224, 1228 (8th Cir. 1971).

Here, the court has found the search warrant was supported only by an unsworn, unsigned affidavit.[5] The warrant, therefore, was invalid. As a result, all evidence

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[5]Even if the magistrate had taken sworn testimony to support the issuance of the warrant, as he testified, the failure to make a record of the testimony would violate Federal Rule of Criminal Procedure 41(d)(2)(C) (formerly Rule 41(c)(2)(D)). *See Christofferson v. Washington*, 393 U.S. 1090, 89 S. Ct. 855, 856, 21 L. Ed. 2d 783 (1969) (Brennan, J. and Marshall, J., dissenting from the Majority's denial of petition for writ of certiorari to Supreme Court of Washington in *State v. Chakos*, 74 Wash. 2d 154, 443 P.2d 815 (1968)) ("The substantive right created by the requirement of probable cause is hardly accorded full sweep without an effective procedural means of assuring meaningful review of a determination by the issuing magistrate of the existence of probable cause. Reliance on a record prepared after the fact involves a hazard of impairment of that right. It is for this reason that some States have imposed the requirement of a contemporaneous record. Thus, in *Glodowski v. State*, 196 Wis. 265, 271, 220 N.W. 227 (1928), the Wisconsin Supreme Court stated that: 'It is an anomaly in judicial procedure to attempt to review the judicial act of a magistrate issuing a search warrant upon a record made up wholly or partially by oral testimony taken in the reviewing court long after the search warrant was issued. Judicial action must be reviewed upon the record made at or before the time that the judicial act was performed. The validity of judicial action cannot be made to depend upon the facts recalled by fallible human memory at a time somewhat removed from that when the judicial determination was made. This record of the facts presented by the magistrate need take no particular form. The record may consist of the sworn complaint, of affidavits, or of sworn testimony taken in shorthand and later filed, or of testimony reduced to longhand and filed, or of a combination of all these forms of proof. The form is immaterial. The essential thing is that proof be reduced to permanent form and made a part of the record which may be transmitted to the reviewing court.'"). *But see United States v. Berkus*, 428 F.2d 1148, 1152 (8th Cir. (continued…)

obtained during execution of the search warrant must be suppressed, *see United States v. Yousif*, 308 F.3d 820, 829 (8th Cir. 2002) ("Evidence that is the 'fruit' of an illegal search or seizure is not admissible, and '[t]he exclusionary prohibition extends as well to the indirect as the direct products of such invasions.'") (quoting *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441 (1963)), unless the Government can establish grounds for applying the "good faith" exception established by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

B. Leon Analysis

Leon stands for the proposition that even when a warrant is invalid, if officers reasonably and in good faith relied on the search warrant, then evidence obtained from the search should not be suppressed. "Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.*, 468 U.S. at 922-23, 104 S. Ct. at 3420 (citations and footnote omitted). As the United States Supreme Court noted in *Leon*:

> It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer

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[5](…continued)
1970) (holding that although preferable, there is no constitutional requirement that testimony in support of a search warrant application be recorded); James Hayden Carroll, Note, *The Constitutionality of the Use of Unrecorded Oral Testimony to Establish Probable Cause for Search Warrants*, 70 VA. L. REV. 1603, 1606 (1984) ("[N]o court has explicitly held that a contemporaneous recording is required by the federal constitution.").

> could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. [Citations omitted.]

Id., 468 U.S. at 923 n.24, 104 S. Ct. at 3420 n.24.

Thus, if serious deficiencies exist either in the warrant application itself, or in the magistrate's probable cause determination, then the *Leon* good faith exception may not apply. As the *Leon* Court explained:

> Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search.
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> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

Leon, 468 U.S. at 914-15, 104 S. Ct. at 3416 (internal citations omitted). The Court noted that good faith on law enforcement's part in executing a warrant "is not enough," because

"[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Leon*, 468 U.S. at 915 n.13, 104 S. Ct. at 3417 n.13 (citing *Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964); *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 23 134 (1959)).

In the present case, the court has found the warrant to be invalid because the application upon which it was based was unsworn, in violation of the Fourth Amendment. The court further finds "the issuing magistrate wholly abandoned his judicial role" in issuing the warrant on the basis of an unsigned, unsworn affidavit, "act[ing] instead as 'an adjunct law enforcement officer.'" *Leon*, 468 U.S. at 914, 104 S. Ct. at 3416 (internal citation omitted). Nevertheless, under *Leon*, the exclusionary rule should not be applied to exclude evidence as a means of punishing or deterring an errant or negligent magistrate. The Supreme Court found that penalizing officers who act in good faith on a warrant for a magistrate's error in issuing the warrant "cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921, 104 S. Ct. at 3419. The relevant question is whether law enforcement actions were objectively reasonable; *i.e.*, whether "the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Leon*, 468 U.S. at 918, 104 S. Ct. at 3418. The *Leon* Court noted:

> As we observed in *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S. Ct. 2357, 2365, 41 L. Ed. 2d 182 (1974), and reiterated in *United States v. Peltier*, 422 U.S. at 539, 95 S. Ct. at 2318:
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> > "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained

> as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The *Peltier* Court continued, *id.* at 542, 95 S. Ct. at 2320:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Leon, 468 U.S. at 919, 104 S. Ct. at 3418-19.

In this case, the magistrate was not presented with a signed, sworn affidavit to establish a substantial basis for determining the existence of probable cause. In such a situation, deference should not be given to the decision of the magistrate to issue the warrant. *See Leon*, 468 U.S. at 915, 104 S. Ct. at 3416. Furthermore, Deputy Suhr was not objectively reasonable in relying upon a search warrant that he knew was not based on probable cause supported by an oath or affirmation. Therefore, his search of Hessman's residence could not have been in good faith. *See Leon*, 468 U.S. at 922 n.23, 104 S. Ct. at 3420 n.23; *United States v. Weaver*, 99 F.3d 1372, 1376 (6th Cir. 1998).

The court therefore recommends application of the exclusionary rule to all evidence arising from execution of the search warrant.

C. Hessman's Statements During Booking

It is not a foregone conclusion that simply because all the physical evidence resulting from the illegal search should be suppressed, so too should Hessman's statements made

while he was being booked into the Palo Alto County Jail. Although "statements that result from an illegal detention are not admissible, . . . [i]t is possible . . . for the causal chain between an illegal arrest and evidence discovered afterwards to be broken. With respect to a statement, for example, this requirement is met if the statement is 'sufficiently an act of free will to purge the primary taint.'" *United States v. Ramos*, 42 F.3d 1160, 1164 (8th Cir. 1994) (citing *Wong Sun*, 371 U.S. at 486, 83 S. Ct. at 416-17).

The Government argues Hessman's statements were made after he was given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The United States Supreme Court explained the interplay between the *Miranda* and Fourth Amendment exclusionary rules in *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985):

> It is settled law that "a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S. Ct. 2664, 2667, 73 L. Ed. 2d 314 (1982) (quoting *Brown v. Illinois*, 422 U.S. 590, 602, 95 S. Ct. 2254, 2261, 45 L. Ed. 2d 416 (1975)).
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> But as we explained in *[New York v.] Quarles*, [467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984),] and *[Michigan v.] Tucker*, [417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974)], a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the "fruits" doctrine. The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits. *Dunaway v. New York*, 442 U.S. 200, 216-217, 99 S. Ct. 2248, 2258-2259, 60 L. Ed. 2d 824 (1979); *Brown v. Illinois*, 422 U.S., at 600-602, 95 S. Ct., at 2260-2261. "The exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. *Id.*, at

> 601, 95 S. Ct., at 2260. Where a Fourth Amendment violation "taints" the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted into evidence. *Taylor v. Alabama*, *supra*, 457 U.S., at 690, 102 S. Ct., at 2667. Beyond this, the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation.

Elstad, 470 U.S. at 206, 105 S. Ct. at 1291.

Thus, as the Court held in *Wong Sun*, all evidence that comes to light due to an illegal search need not be excluded as 'fruit of the poisonous tree.'

> Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. Maguire, Evidence of Guilt, 221 (1959)." *[Wong Sun*, 371 U.S.] at 487-488, 83 S. Ct., at 417.

Brown v. Illinois, 422 U.S. 590, 599, 95 S. Ct. 2254, 2259, 45 L. Ed. 2d 416 (1975). The *Wong Sun* Court observed that excluding statements obtained due to Fourth Amendment violations protects Fourth Amendment rights "in two respects: 'in terms of deterring lawless conduct by federal officers,' and by 'closing the doors of the federal courts to any use of evidence unconstitutionally obtained.'" *Wong Sun*, 371 U.S. at 486, 83 S. Ct. at 416 (citations omitted). Thus, the Court explained, the exclusionary rule "'is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.'" *Brown*, 422 U.S. at 599-600, 95 S. Ct. at 2260 (quoting *Elkins v. United States*, 364 U.S. 206, 217, 80 S. Ct. 1437, 1444, 4 L. Ed. 2d 1669 (1960).

The *Brown* court elaborated on the test to be applied in determining whether a statement that follows an illegal arrest is sufficiently voluntary to cure the primary taint. The Court's discussion is instructive in this case:

> If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. *See Davis v. Mississippi*, 394 U.S. 721, 726-727, 89 S. Ct. 1394, 1397, 22 L. Ed. 2d 676 (1969). Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expendent [sic] of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.' *See Mapp v. Ohio*, 367 U.S. [643,] 648, 81 S. Ct. [1684,] 1687[, 6 L. Ed. 2d 1081 (1961)].
>
> It is entirely possible, of course, . . . that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, alone and *per se*, cannot always make the act sufficiently a product of free will [to] break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited. *See Westover v. United States*, 384 U.S. 436, 496-497, 86 S. Ct. 1602, 1639, 16 L. Ed. 2d 694 (1966).
>
> While we therefore reject the *per se* rule . . ., we also decline to adopt any alternative *per se* or 'but for' rule. . . . The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an

> important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. *See Wong Sun v. United States*, 371 U.S., at 491, 83 S. Ct. at 419. The voluntariness of the statement is a threshold requirement. *Cf.* 18 U.S.C. § 3501. And the burden of showing admissibility rests, of course, on the prosecution.

Brown, 422 U.S. at 602-04, 95 S. Ct. at 2261-62 (footnotes omitted); *accord Ramos*, 42 F.3d at 1164.

In the present case, Hessman made post-*Miranda*, incriminating statements during booking about his possession and use of illegal drugs. As was the case in *Brown*, Hessman's statements were separated from his illegal arrest by a short period of time, "and there was no intervening event of significance whatsoever." *Brown*, 422 U.S. at 604, 95 S. Ct. at 2262. It is clear Hessman's statements arose solely and specifically as the result of the illegal search and his resulting arrest. Accordingly, the court finds Hessman's post-*Miranda* statements at the jail also should be suppressed. *See United States v. Clark*, 822 F. Supp. 990 (W.D.N.Y. 1993); *United States v. Oguns*, 921 F.2d 442, 447 (2d Cir. 1990).

IV. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections[6] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Hessman's motion to suppress (Doc. No. 22) be **granted**, and all evidence flowing from execution of the search warrant, including Hessman's statements at the jail, be suppressed.

IT IS SO ORDERED.

DATED this 14th day of April, 2003.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[6]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).